EMPLOYMENT TRIBUNALS

Claimant: Mr K Sawrey v Cosworth Ltd

Respondent: Cosworth Ltd

COSTS JUDGMENT

The Respondent's application for costs is refused.

REASONS

Introduction

1. I conducted a hearing on 23 February 2023, and gave judgment with reasons that day. The written document containing the judgment and reasons was sent to parties on 2 March 2023.

2. The Respondent made a costs application on 16 March 2023. I gave instructions for a letter to parties about that application which was sent on 3 April 2023.

3. As stated in the letter sent (on my instructions) on 23 September 2024:

> There was later a hearing before a different judge on 24 May 2023, and orders were sent to parties on 3 June 2023.
>
> I note the contents of paragraph 10 of those orders. To summarise, both parties were content for the costs application (a) to be decided by me and (b) on the papers.
>
> Paragraph 6.1 of the orders gave instructions. The file contains the Respondent's representative email of 7 June 2023, with attachments.
>
> The Claimant was supposed to respond by 21 June 2023. The Tribunal's file has nothing from his side prior to an email of 12 July from Rich & Carr solicitors which was about other matters.
>
> There is no email from the Respondent dated 28 June 2023 on the Tribunal file, other than as forwarded on 16 July 2024, together with bundle. (*) The bundle contains the

> Claimant's 5 April 2023 reply to the 3 April orders, but nothing sent later, by 21 June 2023.
>
> Since the file seems incomplete, I am giving the Claimant the further opportunity to either write to the Tribunal and the Respondent by 7 October 2024 with a copy of anything he sent, at the time, in accordance with paragraph 6.1.2 of EJ Michell's orders, or else the opportunity to submit something now, and ask me to take it into account.
>
> I have asked for the file to be returned to me after 8 October 2024, and if there is nothing else from the Claimant by then, I will make the decision based on what is in the file and in the Respondent's bundle (received 16 July 2024).

4. The Claimant has sent an email dated 3 October 2024, and I have taken the contents into account.

The Law

5. In the Employment Tribunals Rules of Procedure, the section "Costs Orders, Preparation Time Orders And Wasted Costs Orders" is Rules 74 to 84.

6. When an application for costs is made, or when the Tribunal is considering the matter of its own initiative, there are potentially the following stages to the decision.

   6.1 Has one (or more) of the criteria (for costs to potentially be awarded) as set out in the rules been met.

      6.1.1 If not, there can be no order for costs.

      6.1.2 If so, which rule or rules contain the criteria which have been satisfied (and why)?

   6.2 Is the rule one which requires the Tribunal to consider making an award, or is it one which says the Tribunal "may" consider making an award.

   6.3 Either way, if the criteria for a costs order are met, that means that the Tribunal has discretion to make an award, not that it is obliged to. So what are the relevant factors in this case, and, taking into account all of the relevant factors (and ignoring anything which is irrelevant), should an award be made.

   6.4 If an award is to be made, what is the amount of the award? (And what is the time for payment, etc).

7. Rule 84 states:

> **84. Ability to pay**
>
> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

8. As per the rule, "ability to pay" is something that "may" be taken into account at each of the last two stages of the decision-making. That is: should an award be made at all; if so, what is the size of the award. A tribunal is not obliged to take "ability to pay" into account, but should specify whether it has done so or not (and, if not, why not). Generally speaking, where a party wants the Tribunal to decide that they do not have the ability to pay, then the onus is on them to (i) raise the point and (ii) provide evidence to back up the argument. That being said, in accordance with the Tribunal's duty of fairness, and in accordance with Rule 2, it may be appropriate for the Tribunal to seek to ensure that a party (especially a litigant in person) understands that the onus is on them (at least, in cases where the order might be a large one): Oni v NHS Leicester City UKEAT/0133/14.

9. Rule 76, insofar as is relevant, states:

> **76.— When a costs order or a preparation time order may or shall be made**
>
> (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
>
> (b) any claim or response had no reasonable prospect of success
>
> (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

10. So one set of criteria for a costs order to be made are those set out in Rule 76(2). I need say no more about them.

11. If the criteria set out in Rule 76(1) are met, the Tribunal must actively consider whether or not to make an award (though it is not obliged to decide to make the award). The three subparagraphs are each independent. It is sufficient that any one of (a), or (b) or (c) is met.

12. As was noted in Radia v Jefferies International Ltd [2020] UKEAT 7_18_2102:

> 63. … earlier authorities, about the meaning of "misconceived" in Rule 40(3) in the 2004 Rules of Procedure, are equally applicable to this replacement threshold test in the 2013 Rules. See in particular Vaughan v London Borough of Lewisham [2013] IRLR 713 at paragraphs 8 and 14(6). However, in such a case, what the party actually thought or knew, or could reasonably be expected to have appreciated, about the prospects of success, may, and usually will, be highly relevant at the second stage, of exercise of the discretion.

> 64. This means that, in practice, where costs are sought both through the Rule 76(1)(a) and the Rule 76(1)(b) route, and the conduct said to be unreasonable under (a) is the bringing, or continuation, of claims which had no reasonable prospect of success, the key issues for overall consideration by the Tribunal will, in either case, likely be the same (though there may be other considerations, of course, in particular at the second stage). Did the complaints, in fact, have no reasonable prospect of success? If so, did the complainant in fact know or appreciate that? If not, ought they, reasonably, to have known or appreciated that?

13. So there can be an overlap in the arguments about whether the party acted reasonably in bring the claim (or conducting the pursuit of the claim or response) [Rule 76(1)(a)] and about whether the claim or response had no reasonable prospects of success [Rule 76(1)(b)]. Both sets of arguments can (and should) be considered. See Opalkova v Acquire Care Ltd EA-2020-000345-RN at paragraphs 24 and 25.

14. As Radia makes clear (paragraphs 65 to 69), a tribunal deciding that the claim/response had no reasonable prospect of success for costs purposes is not conducting the same analysis as for a strike out application. The Tribunal is not necessarily obliged to take the paying party's case at its highest, but rather can assess what the paying party knew (or ought reasonably to have known), and when, about the strengths/weaknesses of its case. In terms of what they knew (or should have known), a party is "likely to be assessed more rigorously if legally represented": Opalkova para 26.

15. As Opalkova also make clear, when there are multiple claims/complaints, the issue of bringing, or continuing, with a claim or response which had no reasonable prospect of success must be analysed separately for each complaint.

15.1 The fact that one or more of the complaints succeeded would not – in itself - prevent a respondent from persuading the Tribunal that there were other complaints that had no reasonable prospect of success.

15.2 Correspondingly, the fact that one or more of the complaints failed – that is that the response to that part of the claim succeeded - would not, in itself, prevent a claimant from persuading the Tribunal that part(s) of the response which dealt with the complaint(s) which did succeed had no reasonable prospect of success

16. Where the argument is that the party has acted "vexatiously, abusively, disruptively or otherwise unreasonably" then the only conduct that is taken into account is that which is (either the bringing of the proceedings or) the way that the litigation has been conducted. The precise details of the conduct in question will be relevant to both (a) whether the criteria in Rule 76(1)(a) are met and (b) whether, in all the circumstances, the Tribunal should exercise its discretion to make a costs order.

17. If the criteria to potentially make a cost order are met, then the factors which are potentially relevant to the decision about whether to make such an order (and, if so, how much the award should be) include, but are not limited to, the following. However, the Tribunal's primary duty is to follow the wording of the rules, and to make specific decisions on the merits of the case in front of it.

17.1 Costs are the exception rather than the rule. A party seeking costs will fail if they do not demonstrate that the criteria for *potentially* making such an order (in the Tribunal rules) have been met. However, the mere fact alone that the criteria have been met does not establish that the general rule is to make a costs order in such circumstances.

17.2 Costs, if awarded, must be compensatory, not punitive. If the argument that there has been unreasonable conduct is made then the whole picture of what happened in the case is potentially relevant. However, it is necessary to identify the specific conduct, and decide what, specifically, was unreasonable about it and analyse what effects it had. Some causal link between the conduct and the costs sought by the other party is required. Yerrakalva v Barnsley [2011] EWCA Civ 1255.

17.3 Was the party warned that an application for costs might be made, and, if so, when, and in what terms.

17.3.1 The lack of such advance warning does not prevent an application being made (or the Tribunal granting it). Rule 77 gives a party up to 28 days after the date on which the judgment finally determining the proceedings was sent to the parties. Furthermore, while the rule give the other party the right to a reasonable opportunity to make representations in response to the application, it does not impose a requirement that they were warned before the application was made.

17.3.2 However, the issue of whether a party (especially a litigant in person) was aware of the possibility of having to pay costs is likely to be relevant. This can be demonstrated by something other than a costs warning from the opposing party: for example, comments made at a preliminary hearing; the fact that they had been involved an earlier case in which there was a costs application; the fact that they themselves had expressed an intention to seek costs from the other side.

17.3.3 If a warning has been made, its precise terms will be relevant. A simple boiler plate threat to apply for costs, which appears to a knee jerk response that the party (or its representative) always sends out is likely to be far less persuasive than a considered attempt to address the arguments raised by the other party, and explain why they have no prospect of success, or to explain why the particular conduct has been

unreasonable, and what the rules or case management orders (specifically) require instead.

17.3.4 The timing of the warning will be relevant, as will the issue of whether the warning was updated and repeated at relevant stages.

17.3.5 The fact that a costs warning was made, even one which is clear and detailed and well-timed, and which identifies the precise basis on which the application was later made, does not guarantee that an order will be made.

17.4 What advice did the party have? Who from? When? It can be a double-edged sword that a party has taken legal advice. On the one hand, they might seek to argue that since a lawyer advised them that the claim had merit, it was not unreasonable to pursue it. On the other hand, the opposing party might seek to argue that (even if the paying party was a litigant in person at the Final Hearing) the fact that they had legal advice available shows that they ought to understood the claim was hopeless, and/or that their conduct was inappropriate, and/or that a settlement offer that had been made was a good one. To rely on the former argument, the paying party might have to waive privilege over the advice in question. However, there is no obligation to do so to defend itself against the latter inference; where privilege is not waived, the Tribunal will not make assumptions that the party specifically received advice that they were acting unreasonably, but the fact that advice was available to them is likely to undermine an argument that, as a litigant in person, they could not reasonably have been expected to anticipate the arguments being raised by the costs application.

Submissions

18. The hearing before me was for Interim Relief. I do not think it necessary or appropriate for me to copy and paste large sections of the written reasons (for refusing the application) into this document. I remember the hearing, and, in any event, I have re-read the judgment. My analysis of the Claimant's interim relief application which I set out there forms part of my analysis of the Respondent's costs application, and the Claimant's replies.

19. As I made clear in those reasons, the Claimant had presented the application based on a theory that (i) he had been dismissed on 2 February 2023 and (ii) the application was within 7 days of the dismissal. (See paragraphs 29 to 31 of the reasons, for example). As stated at paragraph 39:

> During the hearing today, the Claimant conceded that he had not been dismissed on 2 February, and sought permission to amend his claim to rely instead on a dismissal by the letter of 16 February. That was 7 days ago

20. The Respondent's costs application is based on the argument that it should receive the costs incurred in seeking to refute the Claimant's argument about a 2 February 2023 dismissal prior to the stage in the interim relief hearing (discussed at paragraph 52 of the reasons) when the Claimant (i) abandoned that argument, (ii) accepted that the dismissal date was the one which the Respondent had contended for (namely 16 February), and (iii) made the application to amend.

21. The costs which the Respondent seeks are:

    21.1 A contribution to the costs of preparing ET3, to reflect the arguments it had to make about why there was no dismissal on 2 February 2023.

    21.2 Costs of witness statement of Darren Cargill (the person who wrote the dismissal letter, on the Claimant's case as originally pleaded) intended to refute the contention that the letter was a dismissal letter.

    21.3 A contribution to the costs of preparing the respondent's hearing bundle, to reflect the unnecessary documents it had to include to attempt to show that there was no dismissal on 2 February 2023.

    21.4 A contribution to the costs of preparing skeleton argument, to reflect the fact that that document was based on the Claimant's contention that there was a dismissal on 2 February 2023

22. By later letter dated 7 June 2023, the Respondent attached a schedule, and an explanation, seeking £8,447. The amount would have been £10,136.40 including VAT, but payment of the sum for VAT was not sought.

23. The Claimant's 26 March 2023 letter is 13 pages.

    23.1 The first eight pages are about different issues.

    23.2 On the ninth page, he asserts that he had initially regarded the 16 February letter as simply being a "revised" dismissal letter, which did not change his opinion that he had been dismissed with effect from 2 February. He also pointed out that the 16 February letter was after he had already submitted the claim form, and application for interim relief. He asserted that the short time limits associated with interim relief applications did not afford him the time to sit back and reflect.

    23.3 The tenth and eleventh pages are not relevant for present purposes. The fact that the Respondent might have been considering dismissing him on 2 February 2023 and earlier does not address the Respondent's arguments for costs, as set out in its 16 March 2023 application.

23.4 On page 12, the letter asserts that the actual dismissal (on 16 February 2023) was for the same reason as the dismissal that he (claims to have) originally believed took place on 2 February 2023.

23.5 The summary section of the letter contains several points that are not relevant for present purposes, but includes the assertion that the process was confusing, and the assertion that the Respondent's attitude and/or the Claimant's mental health contributed to the fact that he was confused by it.

24. I note the Claimant's letter of 5 April 2023, but do not need to comment on it.

25. I note the Claimant's 3 October 2024 letter, and what he says about the protected disclosures and his correspondence with other agencies. I am satisfied that the Claimant is sincere in his belief that there has been wrongdoing, and in his belief that there has been an honest and genuine attempt by him to draw attention to it. I do not know whether he is correct that there has actually been wrongdoing, and I do not need to try to decide that for the purpose of making decisions on the costs application.

Analysis and conclusions

26. The Claimant made clear at the hearing that he was not arguing that there had been a constructive dismissal. As mentioned in paragraph 13 of the reasons:

> For the claimant to succeed in his interim relief application, it is necessary for him to show that there is a pretty good chance of succeeding on each required element of the s.103A claim. In other words that he has to show there is a pretty good chance that the final tribunal will decide that there actually was a protected disclosure, as well as showing that there is a pretty good chance that the disclosure, if any, was the principal reason for his dismissal

27. To be clear, then, one of the elements that the Claimant had to demonstrate was that he had a "pretty good chance" of showing that he had been dismissed [as well as showing that he had made a protected disclosure (or more than one), and that that protected disclosure was the reason for the dismissal.]

28. It is by no means academic that the Respondent accepted, before the hearing on 23 February 2023, that the Claimant had actually been dismissed by the Respondent. There is a crucial difference between a dismissal by Mr Cargill on 2 February 2023 and by Ms Prajapati on 16 February 2023. Apart from being two different people, with different jobs, and different potential motivations for why a (particular) protected disclosure might cause them to want to get rid of the Claimant, anyone dismissing the Claimant on 2 February 2023 could only have had knowledge of events up to that date, whereas anyone dismissing the Claimant on 16 February might have had knowledge of events from 3 to 16 February.

29. Had the Claimant maintained his argument, at the interim relief hearing, that he was dismissed on 2 February 2023, the application would not have succeeded. I would not have decided that he had a pretty good chance of showing (at a final hearing) that he was actually dismissed on 2 February 2023. On the contrary, the Respondent had a very good chance of showing (at a final hearing) that he was not. As mentioned in paragraph 32 of the reasons, the Claimant's case was based on the fact that the letter said the time for appeal was "*within five working days of receiving this notice of dismissal*". However, the rest of the letter made clear that he was not dismissed, and the Respondent promptly corrected the error. My decision would have been that there was – at most - a very low chance that a tribunal, at a final hearing, would decide that the words used in the letter amounted to a dismissal (and there was no argument that the Claimant had been told orally that he was dismissed).

30. The specific element of the Claimant's argument that he had a "pretty good chance" of showing that he was actually dismissed on 2 February 2023 is one which had no reasonable prospects of success. Since that was a necessary ingredient of the interim relief application that he presented (prior to the concession and amendment application), it follows that the interim relief application as a whole had no reasonable prospects of success.

31. Although I take into account that the Claimant is a litigant in person, I am satisfied that he must have known that the argument that Mr Cargill's letter of 2 February 2023 (which was amended and corrected the same day) did not amount to a dismissal was likely to succeed. [At the least, he must have known that there was no realistic chance that a judge, at an interim relief hearing, would decide that he had a "pretty good chance" of proving that he had been dismissed by that letter.] I accept that simply issuing a new letter later on could not amount to the retraction of a dismissal which had already been brought about by an original letter; however, that is not what happened here. He received a letter which made clear (on any objective basis) that he was being given a written warning and was required to return to work. (See paragraph 40 of the reasons). The correction of the phrase "*within five working days of receiving this notice of dismissal*" was done promptly and removed any doubt whatsoever.

32. I am satisfied that the criteria in Rule 76(1)(b) are met. The interim relief application (as presented in writing on 8 February 2023, and based on alleged dismissal on 2 February 2023) had no reasonable prospect of success. I am satisfied that the Claimant knew or should have known that that was the case. That is, even as a litigant in person, he should have realised that no judge, dealing with an interim relief application, was going to decide that he had a pretty good chance of establishing (at a final hearing) that he had been dismissed on 2 February 2023.

33. I also have to consider if there was unreasonable conduct of the proceedings. One of the Claimant's arguments appears to be that time limits are short, and that if he

failed to present the interim relief application by 9 February 2023, and it subsequently turned out that he had been dismissed on 2 February 2023, then he would be out of time. That is true, of course. However, the Claimant did not make the application on the basis that he was doing so simply to protect his position, and that he would withdraw provided the Respondent formally confirmed that he was not dismissed. Furthermore, as stated in previous paragraphs, my assessment is that an employee could not reasonably have formed the belief that the 2 February letter operated to dismiss them.

34. In terms of presenting the 8 February application, the fact that the Claimant's conduct could potentially be categorised as falling within Rule 76(1)(a) as well as 76(1)(b) adds nothing.

    34.1 I accept the Claimant's argument that there was only limited opportunity between the notice of hearing on 15 February, and seeing the Respondent's defence to the application, and the start of the hearing on 23 February, for him to abandon the (in my assessment, misconceived) assertion that he had been dismissed on 2 February 2023. That is by no means a complete defence to the Respondent's argument that he should have to pay costs. However, having presented the application in the first place, I do not think that there was additional unreasonable conduct by failing to withdraw it prior to the start of the hearing.

    34.2 The only reason that presenting the application was unreasonable is that it had no reasonable prospects of success. I am satisfied that the Claimant was not seeking to annoy the Respondent for improper reasons. He believed that there had been wrongdoing and he wanted to present the matter to the Tribunal; it was not reasonable for him to think that an interim relief application would succeed, but, other than that, was not acting vexatiously.

35. Had the Claimant in fact waited until 16 February, and issued his interim relief application then, it seems to me that the Respondent's costs would have been largely the same. No statement from Darren Cargill might have been required in those circumstances. That being said, I am not sure it was needed in any event, given the contents of the contemporaneous correspondence.

36. Had the Claimant in fact withdrawn his 8 February application before the 23 February hearing, but then presented a new application based on the 16 February dismissal, then, it seems to me that the Respondent's costs would have probably been greater than they actually were; in any event, I am confident that they would not have been smaller.

37. It was probably frustrating for the Respondent's legal team that the morning of the hearing was spent addressing one argument (dismissal on 2 February) only for the Claimant to pivot before the lunch break. This did not extend the hearing, however.

It would not have concluded prior to 1pm had the Claimant been quicker to concede that he had not been dismissed on 2 February and to seek permission to amend the application. Furthermore, the substance of the skeleton argument would have been largely the same if (before the hearing commenced) the Claimant had been relying solely on a dismissal date of 16 February 2023 (by Ms Prajapati). The Respondent would still – in my assessment – have been keen to present arguments about what Mr Cargill had done, and how Mr Cargill's decision was not infected by any desire to retaliate for (alleged) protected disclosure. Quite apart from wanting to show me that the employer as a whole had acted reasonably, the Respondent's legal team would have been likely to want to head off any potential Jhuti type argument (for example, that even if Ms Prajapati was not motivated by protected disclosure, she had been deceived by others, including Mr Cargill).

38. In my assessment, the contents of the bundle and the skeleton argument would have been largely similar, though with no need for the submissions about section 111 ERA and the relevant case law on its interpretation (in terms of when it is too early to present an unfair dismissal complaint).

39. The interim relief application failed in any event, even after I had allowed the amendment. A significant part of the Claimant's argument for why he should succeed is briefly alluded to in paragraph 61 of the reasons (and in the reconsideration decision). The Claimant argued that even if he was dismissed for absence, then that would mean that a complaint under section 103A ERA should succeed in these circumstances, because of the connection between his absence and the subject matter of his (alleged) protected disclosures, and the Respondent's (alleged) failures to address the concerns which he had raised. The Claimant relied on that argument regardless of whether the dismissal occurred on 2 February 2023 or 16 February 2023. It is another reason why the application would have failed even if he had persisted in the argument that he was dismissed on 2 February; however, the change to 16 February did not help him in this regard, and that would have been the case even if he had waited until on or after 16 February 2023 to make the application.

40. It is not fatal, in itself, to the Respondent's application that (in my judgment) its costs would have been largely similar even had the Claimant waited until 16 February (and presented his interim relief application then) rather than submitting the claim on 8 February 2023 (and being allowed to rely on dismissal date of 16 February, because of the amendment which I granted). However, that is a relevant factor to the exercise of my discretion. Costs are to be compensatory, rather than punitive. So long as I can be satisfied that some unnecessary costs (even a small sum) were incurred, then I could make the decision in principle, to award some costs, and then decide the amount. As per Yerrakalva, some causal link between the impugned conduct and additional costs to the Respondent is required, but, so long as that link exists, the Respondent is not required to prove that the costs it is seeking would not have been incurred in any event.

41. However, in these circumstances, I do not exercise my discretion to award costs. The Claimant's attempt to argue for a 2 February dismissal was misguided, but, before lunch on the day of the hearing (23 February), he had abandoned that argument. As I said when allowing the amendment, had I refused the amendment, the Claimant would still have been in time to issue interim relief proceedings later the same day, based on 16 February dismissal. Had that happened, then the Respondent would have truly thrown away almost all the costs of the 23 February hearing. There would then have been a strong argument that the Claimant should pay almost all of the Respondent's costs of preparing for and attending that 23 February hearing; the fact that there would – on this hypothesis – have been two separate hearings, one of which was unnecessary, and caused by the Claimant's attempt to argue for a 2 February dismissal date, would have been highly relevant. However, that is not what happened. Instead, the amended interim relief application was disposed of on the day, without the need for the parties to prepare for, and attend, a second hearing. In these circumstances, I am satisfied that the Respondent should be responsible for its own costs of the hearing, including preparation for the hearing.

Employment Judge Quill

Date: 9 October 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
7 November 2024

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T Cadman

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FOR EMPLOYMENT TRIBUNALS